SYDNEY DOWTON

IBLA 99-357 Decided March 30, 2001

Appeal from a decision of the Challis, Idaho, Resource Area Manager, Bureau of Land Management, assessing trespass damages for the unauthorized use of public lands. IDI-25253.

Affirmed as modified in part; set aside and remanded in part.

1. Federal Land Policy and Management Act of 1976: Permits--Trespass: Generally

   A BLM trespass notice issued under 43 C.F.R. § 2920.1-2 is properly affirmed when an appellant, despite being advised numerous times of the need to apply for a land use permit, continues to use public lands for agricultural purposes without a permit issued pursuant to 43 U.S.C. § 1732(b) (1994).

2. Appraisals--Federal Land Policy and Management Act of 1976: Permits--Trespass: Measure of Damages

   A BLM determination of the fair market value of the use of public land, both authorized and unauthorized, will be set aside where the value is based on a rental estimate which explicitly states that an appraisal is necessary if the case is controversial and the record establishes that the matter has been controversial from the outset.

APPEARANCES: William G. Myers, III, Esq., Boise, Idaho, for appellant; Gloria Romero and Renee Snyder, Challis Resource Area Office, Bureau of Land Management, Salmon, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Sydney Dowton 1/ appeals the May 27, 1999, trespass decision issued by the Challis, Idaho, Resource Area Manager, Bureau of Land Management

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1/ Although the notice of appeal names both Sydney Dowton and Karen Dowton as appellants, the challenged decision named only Sydney Dowton. Accordingly, we will refer to Sydney Dowton, singularly, as the appellant.

(BLM), assessing damages for the unauthorized use of 59.59 acres of public land in secs. 23, 26, 27, and 35, T. 16 N., R. 20 E., Boise Meridian, Custer County, Idaho, identified as parcels 2 through 5 (IDI-25253). 2/ Specifically, parcel 2 contains 28.32 acres described as lots 5 and 7, sec. 35; parcel 3 embraces 9.15 acres described as lot 7, sec. 27; parcel 4 includes 6.82 acres described as lot 11, sec. 26; and parcel 5 encompasses 15.3 acres described as lot 3, sec. 23.

Dowton has owned the Ellis Ranch adjacent to parcels 2-5 since 1971 and runs a livestock operation on that land. In 1984, BLM issued Dowton a land use permit pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1994), authorizing the use of two of the parcels 3/ in conjunction with his livestock operation. See SOR, Ex. 3. Rental value for the 22 acres within the permit was calculated on the basis of the value of a 5-day delayed turnout of 207 cattle in the Hat Creek Allotment. 4/ Dowton paid the assessed rental for the use of the parcels which was based on the number of AUM's attributed to the land. See SOR, Ex. 8. The permits expired on April 30, 1987. See SOR, Ex. 3. On January 26, 1991, Dowton applied for a permit to use all 4 parcels for grazing and hay. See SOR, Ex. 4. Although the permit was never issued, Dowton paid the calculated annual rental fees for 1990, 1991, and 1992, which apparently represented a one-third share of crop production. See SOR at 4.

Despite the lack of a land use permit, Dowton continued to use parcels 2-5 while he and BLM attempted to reach a long-term solution to his use-related issues that recognized both the parcels' importance to Dowton's ranching operation and the administrative difficulties BLM faced in managing these small, isolated tracts. On May 19, 1995, Dowton met with BLM to

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2/ On June 4, 1999, BLM issued Dowton a discrete notice of trespass, assessing him fees and damages for the unauthorized use of another tract of public land described as lots 2 and 5 north of the present course of the Salmon River, sec. 26, T. 16 N., R. 20 E., Boise Meridian, Custer County, Idaho. This latter tract was denominated by BLM as parcel 1. Dowton also appealed that decision, and the appeal has been docketed as IBLA 99-334. Parcel 1 was treated by BLM as a separate trespass case because Dowton had challenged the ownership of that parcel. We similarly have considered the appeals as separate cases and are issuing individual decisions in the two appeals.

3/ Although the application was for three parcels, the permit itself embraced public lands within only two of the parcels. The permit identified only the aliquot portions of the public land survey within which the parcels are situated. It appears from the description that the permit embraced parcels 4 and 5. See Exhibits 2, 3 to Statement of Reasons (SOR).

4/ 207 animal units (AU's) times 0.16 months equals 34.5 animal unit months (AUM's). A rental value of $2.12/acre was calculated by multiplying the BLM grazing fee of $1.35 per AUM by 34.5 AUM's divided by 22 acres.

discuss his unauthorized use of the public land. At that meeting Dowton proposed to settle the controversy by trading a public corridor through his lands along the Salmon River for parcels 1-5. Dowton also requested an interim permit for use of the lands in exchange for big game use of his private agricultural lands. In response, BLM agreed to evaluate the proposal and stated that, in the meantime, Dowton could continue to irrigate the lands currently under production but could not break any new ground. See May 22, 1995, Interoffice Memorandum at 2. Thereafter, BLM summarized the May 19, 1995, meeting, Dowton's proposal, and BLM's plan for evaluating the proposal in a May 31, 1995, letter to Dowton. In the letter, BLM explicitly authorized him to continue his existing uses of the lands involved pending issuance of a final decision on the matter.

Upon evaluation, BLM staff found Dowton's proposal unacceptable. On April 2, 1996, BLM met with Dowton to present a counterproposal which included selling or exchanging parcels 3-5 to Dowton but retaining parcel 2 in public ownership, with Dowton having the option of entering into a long term lease for agricultural use of the parcel. Dowton rejected the counterproposal, stating that if BLM chose not to accept his proposal, he would place fences on the line on the parcels which would have, among other things, blocked access to parcel 2 unless the public easement along the north side of the Salmon River originally acquired by the Idaho Department of Fish and Game on April 20, 1966, still existed. 5/ Dowton and BLM also discussed the expired land use permit. BLM indicated that it would issue a new 3-year permit for 1996-1999 and collect back rent for 1993-1995, with the rent based on an appraisal. Dowton apparently agreed to this procedure. See Apr. 4, 1996, BLM Memorandum, at 2.

In an estimate of rental value dated May 3, 1996, and approved on May 6, 1996, BLM estimated the market rent for Dowton's use of parcels 2-5 to be $1,200 per year. In so doing, BLM valued the land both for hay production and for irrigated pasture, finding that the annual market rent for hay production, given that BLM provided neither irrigation equipment nor water, was $20/acre for the 59.59 acres for a total of $1,191.80. Further, BLM found that the yearly rental value of the land for irrigated pasture based on a carrying capacity of 2 AU's per acre and 2 months of use, i.e., $5/AUM x 238.36 AUM's (2 AU's per acre for 2 months use per year), also equaled $1,191.80. In the estimate, BLM rounded the $1,191.80 to $1,200. The estimate specified that it was not an appraisal and stated that, where market rentals appeared to be large or the case would be controversial, a full narrative appraisal should be requested.

On December 2, 1997, the Idaho State Office, BLM, issued a memorandum providing guidance for estimating market rents in Lemhi and Custer Counties for Federal lands used for irrigated pasture and irrigated hay production.

5/ By letter dated Dec. 23, 1996, the Idaho Department of Fish and Game advised BLM that it considered the easement to still be viable and available for use.

Relying on a market study of rents where the lessor contributed only the land used for irrigated pasture and irrigated hay production, BLM determined that the market rents for public lands where BLM provided the land only and the lessee supplied the water, irrigation system, and everything else, should be estimated at $20/acre per year. BLM added, however, that in cases where market rental estimates might be controversial or where individuals disagreed with the estimate, an appraisal should be requested. See SOR, Ex. 14.

In a letter dated May 6, 1998, Dowton informed BLM that he disagreed with the agency's rental calculations and enclosed a check for $1,093.50 (135 AUM's x $1.35/AUM x 6), the amount he calculated that he owed for use of the lands through 1998. He based his rental amount on BLM's 1983 rental determination.

By letter dated June 30, 1998, BLM advised Dowton that he owed rental for the period January 1, 1993, through the present for parcels 2-5. BLM stated that a fee of $20/acre had been used to calculate the rent for use of the land with an additional charge of $50 per year for a haystack storage area on parcel 2. The $7,125.50 total rent due also included $300 for administrative costs. 6/ BLM appended a land use permit offer to the letter, which it asked Dowton to sign and date, pointing out that if he chose not to accept the offered permit, he would be required to discontinue all use of the parcels and remove the haystack. BLM's letter also informed Dowton of his right to appeal the decision.

Dowton neither paid the rental and administrative costs nor appealed BLM's decision, and on October 7, 1998, BLM issued him a notice to cease and desist. After summarizing the content of the June 30, 1998, letter and noting Dowton's failure to respond, BLM found Dowton to be in trespass because he had cultivated and irrigated public lands and had used public land for storage of private property in violation of FLPMA and 43 C.F.R. §§ 2801.3 and 9262.1. Hence, BLM concluded that Dowton was liable for the fair market value rent of the public lands, rehabilitation/stabilization of the lands damaged by his acts, and administrative costs incurred by BLM as a consequence of his acts. Further, BLM directed Dowton to permanently cease and desist the violative actions and afforded him 15 days to either arrange settlement of the trespass liability or present evidence showing that he was not a trespasser.

Dowton met with BLM on April 1, 1999, to discuss the cease and desist notice and the unauthorized use of the land. In an April 22, 1999, letter, BLM summarized that meeting, noting that the proposed Challis Resource Management Plan (RMP) designated parcels 3-5 for disposal through sale and parcel 2 for exchange for like or greater resource values. Further, BLM pointed out that the current unauthorized use had to be resolved through

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6/ These rental calculations were documented in an enclosure to the letter entitled "Syd Dowton Unauthorized Use Settlement."

the payment of fees and either authorization or discontinuation before any sale or exchange of the lands could occur. Enclosed by BLM was an unauthorized use settlement form setting out the rental for parcels 2-5 for the period January 1, 1993, to April 1, 1999, for Dowton to sign and date. The settlement form utilized the $20/acre market rent established in the May 1996 rental estimate and the December 2, 1997, Idaho State Office memorandum, to determine that the rental due for parcels 2-5 was $7,452 ($1,192/year ($20/acre/year x 59.59 acres) x 6 years, 3 months) and added to this amount $312 ($50/year x 6 years, 3 months) for the haystack rental and $300 for administrative costs. The form credited Dowton with the $1,093.50 paid in May 1998, leaving $6,970.50 as the balance due for parcels 2-5. 7/ Further, BLM stated that if Dowton disagreed with the calculations he should document on the form any calculations he disputed. The agency advised Dowton that once he had paid the fees and submitted a land use permit application, the application would be processed and a permit issued. A period of 15 days was allowed by BLM to arrange full settlement of the trespass liability, in the absence of which the agency would issue a trespass decision and a bill for collection of the full amount.

On May 10, 1999, BLM received the settlement agreement signed by Dowton, accompanied by payment of $6,058.50. The agreement contained the handwritten notation "59.59 acres 1993 thru 1999," but no other explanation of the derivation of the $6,058.50 figure. 8/

On May 27, 1999, BLM issued its trespass decision, finding that Dowton still owed $912 for use of parcels 2-5 through March 31, 1999, as well as an additional $200 for use from April 1 through May 31, 1999, for a total of $1,112. BLM informed him that it would not consider issuing him a land use permit for any of the parcels until it had received full payment for the trespass and, if full payment was not received, would process additional willful trespass cases against him for continued unauthorized use of the public lands. Since Dowton had failed to provide any information relevant to the trespass case, BLM issued a bill for collection for the remaining trespass liability.

On appeal, Dowton argues that no trespass occurred because BLM's May 31, 1995, letter specifically authorized him to use parcels 2-5, and asserts that BLM is estopped from denying that such authorization exists.

7/ The total amount owed set forth in the settlement form ($11,396.50) included $4,426 in rent for the use of parcel 1 from June 23, 1993, to April 1, 1999. Since parcel 1 is not at issue in this appeal, the rent attributable to parcel 1 has been deducted from the total to arrive at the amount due for parcels 2-5.

8/ Even if Dowton intended that amount to omit the haystack and administrative charges ($312 and $300, respectively) and reflect just the rent due for the use of the parcels, subtracting those charges from the total amount due ($6,970.50) leaves $6,358.50, not $6,058.50.

He further maintains that BLM invoked inapplicable regulations as the basis for the trespass, averring that, although the May 27, 1999, decision did not cite any statutory or regulatory authority for the trespass determination, it apparently was predicated on the October 7, 1998, cease and desist order which found him in violation of 43 C.F.R. §§ 2801.3 and 9262.1. Dowton asserts that 43 C.F.R. § 2801.3 regulates rights-of-way and temporary use permits, not land use permits, and thus provides no authority for the trespass decision.

In any event, Dowton claims that BLM overcharged for the alleged trespass because it seeks more than the fair market value rent for the use of the parcels. He points out that BLM has calculated four different rental values for the parcels ranging from $2.12 to $20 per acre. He avers that BLM's adoption of the $20/acre rate rests on the May 1996 rental estimate and the December 2, 1997, Idaho State Office Memorandum, neither of which is an appraisal and both of which acknowledge the need for an appraisal when the case is controversial and/or where individuals disagree with the estimate, conditions which exist here. Dowton maintains that the most significant flaw in the market rental estimate is its analysis of the value of irrigated pasture in the context of this dispute, asserting that since he provides the only irrigation on the parcels, he should not be charged for the additional value he himself has added to the land. In support of his argument that even prime pasture does not command $20/acre, Dowton submits a copy of a pasture ranch lease (SOR, Ex. 15) which grants him yearly use of 354 acres of irrigated and dry land pasture between June and November for an annual sum of $2,500 or $7.06/acre, and obligates him to provide all the equipment, material, and labor necessary to irrigate the pasture. Dowton requests that the trespass decision be voided ab initio and the matter remanded to BLM for a full narrative appraisal of the parcels that reflects his contribution to the value of the parcels, applies appropriate credits, and eliminates the $300 administrative charge. 9/

In response, BLM acknowledges that the October 7, 1998, cease and desist notice erroneously cited 43 C.F.R. § 2801.3, instead of 43 C.F.R. § 2920.1-2, the regulation applicable to land use permits, but contends that both regulations have the same meaning and intent. As to Dowton's claim that his use was authorized, BLM avers that subsequent events undermine his reliance on the May 31, 1995, letter, as approval of his continued use of the land. In this regard, BLM points out that it sent Dowton land use permit applications for his use of the public land shortly after issuing the May 1995 letter, but he failed to complete the applications or

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9/ Dowton also wants the Board to direct BLM to proceed with the proposed sale of parcels 3-5 and the exchange of parcel 2 as set forth in the proposed RMP. Since the appealed BLM decision did not address these matters, we have no jurisdiction to grant the relief Dowton seeks, regardless of the merits of his position, and deny this request.

return any forms. Thus, BLM asserts that when Dowton rejected its April 2, 1996, counter proposal, he nevertheless agreed to settle the unauthorized uses on parcels 3-5, pay back rental, and enter into a land use permit for the continued use of the parcels while working toward an eventual sale of the parcels to him. Further, BLM contends that in 1997 it again asked Dowton to complete a land use permit application, which he did not do, although he did, in 1998, submit $1,093.50 to partially cover rental from 1993 through 1998. In addition, BLM notes that its June 30, 1998, decision included land use permit applications which needed only to be reviewed and signed, yet Dowton failed to return those forms to BLM. According to BLM, these subsequent events also negate Dowton's estoppel argument because they show that he knew he needed a land use permit to legitimize his use of the parcels.

Although it cited the wrong regulatory provision in the October 7, 1998, cease and desist notice, BLM argues that both the cited section and the applicable section, 43 C.F.R. § 2920.1-2, address unauthorized use and have the same intent and meaning. It is asserted by BLM that, without the required authorization, use of the public lands may be a trespass. Although provided with numerous opportunities to apply for the required land use permits, BLM stresses that Dowton chose not to do so. As to Dowton's claim that BLM overcharged for the alleged trespass, the agency essentially contends that Dowton's objection to the rental value is untimely because he did not appeal the June 30, 1998, decision calculating the rental rate, which also explained the appeal process for challenging the rate and estimated value.

[1] Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), authorizes the Secretary of the Interior to issue permits for various uses of the public lands including agricultural uses. Applicable regulations are found at 43 C.F.R. Part 2920. These regulations require that land use authorizations be issued only at fair market value and only for uses that conform with BLM plans, policy, objectives, and resource management programs. 43 C.F.R. § 2920.0-6(a). Under 43 C.F.R. § 2920.1-1, BLM may authorize "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law," including "residential, agricultural, industrial, and commercial" uses. C Bar C Ranch Partnership, 132 IBLA 261, 267 (1995); Sierra Production Service, 118 IBLA 259, 262 (1991). Under 43 C.F.R. § 2920.1-2, any use, occupancy, or development, other than casual use, without authorization shall be considered a trespass. A person in trespass shall be liable to the United States for the administrative costs incurred by the United States as a consequence of the trespass, the fair market rental value rental of the public lands for the current and past years of trespass, and the rehabilitation and stabilization of the lands or the costs incurred by the United States in performing the necessary rehabilitation and stabilization. 43 C.F.R. § 2920.1-2(a); Universal City Studios, Inc., 120 IBLA 216, 221 (1991). Because BLM admittedly cited the wrong regulation in its October 7, 1998, cease and desist notice, to the extent that erroneous citation might have been incorporated

into the appealed decision, we modify the appealed decision to reflect that the proper regulatory basis for the trespass notice is 43 C.F.R. § 2920.1-2(a), not 43 C.F.R. § 2801.3. 10/

Dowton does not deny the need for authorization to use public lands, including parcels 2-5; rather, he insists that BLM's May 31, 1995, letter provided the necessary permission for his continued use of the land and estopped the agency from asserting that his use is unauthorized. While we agree that the letter did initially sanction his use, BLM's subsequent actions beginning in April 1996, including its repeated reminders that he needed to apply for a land use permit to validate his use of the land, effectively rescinded that authorization and rendered unreasonable any persisting reliance on the letter. Because Dowton was aware of the true facts, i.e., that he needed a land use permit for his use of parcels 2-5, his claim of estoppel against BLM fails. See, e.g., United States v. Webb, 132 IBLA 152, 167-68 (1995), and cases cited. Accordingly, we uphold BLM's determination that Dowton's continued use of parcels 2-5 constitutes a trespass.

[2] Dowton does not contest his obligation to pay fair market value rent for his use of the parcels, whether unauthorized or authorized. Under 43 C.F.R. § 2920.1-2, a person determined to be in trespass is liable for the fair market value rental of the lands for the current and past years of trespass. Similarly, holders of land use permits are required to pay annual rental of no less than the fair market value of the rights authorized. 43 C.F.R. § 2920.8. Thus, fair market value rent must be paid for both authorized and unauthorized use of public land. See Universal City Studios, Inc., 120 IBLA at 220-21.

Dowton objects, however, to BLM's rental estimate, arguing that BLM should have prepared an appraisal, not just an estimate, and that, in any event, the estimate greatly exceeds the fair market value rent for the land. 11/ Although the Board will generally uphold the fair market value established by an appraisal unless an appellant shows error in the appraisal method used or demonstrates by a preponderance of the evidence that the charge is excessive (see, e.g., C Bar C Ranch Partnership, 132 IBLA at 268; Sierra Production Service, 118 IBLA at 263), BLM did not establish the fair market value rental of the parcels by an appraisal. Instead, the agency relied on the May 1996 rental estimate and the December 2, 1997, Idaho State Office Memorandum. Each of these

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10/ We note that the substance of the two regulations is similar, and that Dowton does not allege, nor does the record show, that he was disadvantaged by the erroneous citation.

11/ Dowton also challenges the assessment of administrative costs on the ground that there was no trespass warranting those costs. Since we uphold BLM's trespass determination, we find its assessment of administrative costs fully justified under 43 C.F.R. § 2920.1-2(a)(1) and affirm its decision to require Dowton to pay those costs.

documents advised that it was not an appraisal and indicated that an appraisal would be necessary if the case was controversial and/or a party disagreed with the rental estimate. The record clearly reveals that this case has been controversial right from the outset. Given these circumstances, BLM should have requested a full, narrative appraisal and not relied on a market estimate to set the fair market value rental for use of parcels 2-5. Accordingly, we set aside BLM's rental estimate and remand the case for preparation of an appraisal of the fair market rental value of Dowton's use of the parcels.

We note that BLM based the rental for the entire period of January 1993 through May 1999 on the May 1996 rental estimate and the December 2, 1997, Idaho State Office Memorandum, despite the fact that the 1996 estimate explicitly states that the date of valuation is May 3, 1996. BLM does not explain why this rate is appropriate for the period before the valuation date. On remand, BLM needs to ensure that it applies the appropriate rental rate or rates for the years at issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed, as modified, in part and set aside and remanded in part.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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John H. Kelly
Acting Chief Administrative Judge